BRIEF IN SUPPORT OF PETITION.

Opinion of the Circuit Court of Appeals for the First Circuit.

The opinion of the Circuit Court of Appeals is printed in the Record, (pp. 25-45) and is incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is set forth in the foregoing petition.

Statement of the Case.

The case has been stated in the foregoing petition and is set forth in the opinion of the Circuit Court of Appeals, which appears in the Record and is incorporated herein by reference.

Specification of Errors.

The errors are specified in the foregoing petition and said specification is incorporated herein by reference.

Points to be Discussed.

The points to be discussed are as follows:

I: Section 15 of the Massachusetts Workmen's Compensation Act governs the common law rights of action against third parties by an employee of an employer who is insured under said Act, where the injury underlying any such cause of action occurs in Massachusetts and is controlling in the case at bar.

II: Section 18 of said Act precludes any right of common law action by such an employee as Bagnel against third parties if such third parties are sub-contractors or the employees of sub-contractors employed upon the same work and the general or superior contractor is insured under the Act and such work is "part of or process in the trade or business" of the insured.

III: Section 24 of said Act does not help the appellant to avoid the consequences of Section 18, in any attempted reservation of common law rights under the Act.

IV: The Workmen's Compensation Act of New York does not apply to the issues raised by the pleadings.

V: The general principles of Conflict of Laws and of the "Due Faith and Credit" clause of the Constitution are violated by the judgment of the Circuit Court of Appeals.

Argument.

I: Section 15 of the Act Controls Any Common Law Right of Action Against Third Parties Open to Employees of Employers Insured Under the Act.

A. *The law of the situs*

Inasmuch as the injury was received in Massachusetts and Bagnel's employer was insured under the Act, and the action is brought in the District of Massachusetts, the law of Massachusetts controls as to the existence of any cause of action based upon said injury.

Magnolia Petroleum Co. vs. Hunt, 64 U. S. S. C. Rep. 208.

Pacific Employers Ins. Co. vs. Industrial Accident Com., 306 U. S. 493, 502.
Young vs. Masci, 289 U. S. 253, 258.
Dennick vs. Central RR., 103 U. S. 11, 18.
Peterson vs. Boston & Maine RR., 310 Mass. 45, 47.
Herman vs. Sladowsky, 301 Mass. 534, 535-536.
Jackson vs. Anthony, 282 Mass. 540, 545-546.

The Circuit Court of Appeals held this proposition to be sound (Record, pp. 31-32) but failed to give it effect.

B. *The Effect of Section 15.*

Section 15 of the Act, disregarding the limitation in Section 18, provides that the employee of an insured employer, injured by the tortious conduct of a third party may (1) elect to take compensation under the Act or (2) elect to proceed at law against the tort feasor but (3) may not do both, and if he elects to take compensation under the Act, the insurer paying such compensation may sue the tort feasor at law either (a) in the name of the employee or (b) in its own name and for its own benefit.

In the case at bar, Bagnel admittedly elected to accept compensation which was actually paid by the insurer under his employer's Workmen's Compensation policy issued under the provisions of the New York Workmen's Compensation Act (Record, pp. 21, 22) and not under his employer's Massachusetts Workmen's Compensation Act. The election, however was an election to accept compensation and since his employer also carried effective Workmen's Compensation insurance under a Massachusetts policy or the insurer's Massachusetts endorsement in the New York

policy, (Record pp. 13, 21, 22) the election was likewise an election under the Massachusetts policy.

To hold that such an acceptance was effective as a waiver of common law rights under New York law only and had no effect upon Bagnel's rights in Massachusetts would be to create an absurd situation, viz: That Bagnel could not sue his employer at common law in New York but could in Massachusetts; that he could accept compensation in New York and could still sue at common law in Massachusetts for the same injury. Hence the acceptance of compensation in New York was a waiver of all common law rights wherever Bagnel might otherwise have any such rights.

The first sentence of Section 15 provides very definitely that an employee of an insured employer—as Bagnel was—cannot accept Workmen's Compensation and sue a third party tort feasor. If the employee accepts such compensation—as Bagnel did—he subrogates to the employer's insurer any right of action against such tort feasor.

Furlong vs. Cronan, 305 Mass. 464, 467.
Miller vs. Richards, 305 Mass. 424, 426.
Jordan vs. Orcutt, 279 Mass. 413, 415.
Tocci's Case, 269 Mass. 221, 224.

II: Section 18 of the Act Limits the Scope of Section 15 and Precludes Any Common Law Right of Action by the Appellee, Bagnel, Against the Appellants Under Circumstances Such as Are Herein Involved.

Section 18 of the Act, limiting very definitely the scope of Section 15, provides that if an insured person—such as Jacobson & Co., Bagnel's employer—enters into a contract with an independent contractor or a sub-contractor—such

as the appellants—to do any of the work which the insured has contracted to do, which work is "part of or process in the trade or business" carried on by the insured—as admittedly is the case at bar (Record pp. 21, 22), and if the insured would be liable to pay compensation under the Act if the injured employee was his employee, then all employees of the insured and of any independent contractor or sub-contractor, are covered by such insurance and no such employee can maintain a common law action against the insured or any such independent or sub-contractor or employee thereof.

Carlson vs. Dowgielewicz, 304 Mass. 560, 562.
Clark vs. M. W. Leahy Co. Inc., 300 Mass. 565, 568.

In the *Clark* case, *supra*, one of the leading cases upon the subject, the Supreme Judicial Court of Massachusetts, at pp. 568-569, stated the following:

> "the insurance of the general contractor or 'common employer' . . . throws its shadow over the whole work . . . Since the insurance of the 'common employer' covers and protects all employees engaged in the 'common employment' . . ., one engaged in that common employment as contractor, sub-contractor or employee cannot be a 'person other than the insured' within Section 15, and the injured employee has no option to sue him at common law. An insurer, whether of the common employer or of a sub-contractor, paying compensation to an employee, cannot recover over under Sec. 15 against a negligent contractor, subcontractor or employee engaged in the 'common employment', for the insurer succeeds only to the rights of the employee receiving compensation. . . . In the application of this rule, it is immaterial whether the subcontractors are insured or not. . . . The essential thing is the existence of a 'common employer' who is an 'insured person' under Sec. 18 . . ., and who is having work done by contract in or about premises specified in Sec. 18 . . . which work is part of or process in his trade or business."

In the *Carlson* case, *supra,* the same Court at p. 562, said:

> "This case is a case where an employee (Carlson) of the insured general contractor (the Pandolf Company) has been injured by an employee (the defendant) of an uninsured independent subcontractor (the truck owner). In such a case the insurer who has paid compensation to the injured employee cannot recover in his name or otherwise against the defendant."

The purpose of the Act and Section 18 thereof is set forth in the case of *Bindbeutel vs. L. D. Wilcutt & Sons Co.*, 244 Mass. 195, at pp. 198-199 as follows:

> "It was the purpose of the . . . act to give all the workmen in a common job the benefit of the statute. It was not the purpose of the act to place a greater burden upon the general contractor than upon the subcontractors *where all were insured* . . . with this end in view (Sect. 18) was enacted, making the general contractor liable under the act to the employees of the sub-contractor in case the latter did not insure his employees as provided by the Statute . . . It was the purpose . . . to give all the employees the benefit of the act, and to induce all employees on the job to carry insurance . . ."

To the same effect, see

Cozzo vs. Atlantic Refining Co., 299 Mass. 260, 267.

Dresser vs. N. H. Structural Steel Co., 296 Mass. 97, 100-101.

Section 18 provides for and operates upon three contingencies:

1. Where the employee gives his employer written waiver of his common law rights against his employer within thirty days of notice of his employer insuring under the Act;

2. Where the employee for thirty days after such notice fails to give his employer any written reservation of common law rights.

   Clark vs. *M. W. Leahy Co. Inc.*, 300 Mass. 565, 568.

3. Where the employee within thirty days of such notice claims or accepts compensation for an injury received within such thirty days.

In all of these cases, Section 18 precludes a common law action against a tort feasor included within the category set up in said section.

The Circuit Court of Appeals erroneously held that the case at bar falls within the second category, *supra*, and that the facts did not support the findings and rulings of the District Court (Record, pp. 20-21) to the effect that Section 18 of the Act precluded the maintenance of Bagnel's law actions, whereas, in fact and in law, the case at bar falls within the third category.

Under the decision in the *Carlson* case, *supra*, Bagnel is clearly barred from maintaining his common law actions.

Bagnel admittedly accepted compensation provided by Workmen's Compensation insurance covering this Springfield job upon which he was injured (Record, pp. 21, 22). There he most effectively waived any common law rights which might otherwise arise out of his injury. His employer's insurer—the same in Massachusetts as in New York (Record, pp. 21, 22)—was bound to pay Bagnel such compensation. The situation is squarely within the provisions of Section 18 of the Act and the decision in the *Carlson* case, *supra*.

In the case at bar, also, the appellants, Springfield Sand and Tile Company and Construction Service Corporation admittedly were independent contractors or sub-contractors of Jacobson & Co., engaged upon work which was part of and process in the trade or business of Jacobson & Co. (Record, pp. 21, 22).

Under Section 18, therefore, the employee of the insured, in this case Bagnel, the employee of the insured Jacobson & Company, cannot maintain any common law action against any sub-contractor of the insured—such as Springfield Sand and Gravel Company or Construction Service Corporation.

III: Section 24 of the Act Does Not Help the Appellee, Bagnel, to Avoid the Consequences of Section 18 of the Act.

The Circuit Court of Appeals held, in substance, that under the provisions of Section 24 of the Act it was incumbent upon the appellants to show the following:

A. That Jacobson & Company were insured under the Act when Bagnel entered its employ in 1937; or

B. That Jacobson & Company so insured after Bagnel entered its employ in 1937;

C. That, in the latter event

1. Jacobson & Company gave notice of so insuring under the Act;

2. Thirty days expired from the date of such notice without Bagnel having given "written notice that he claimed" or reserved his "right of action at common law" under which conditions he would be "held to have waived" such right.

D. That the appellants had failed in this respect and therefore failed to establish their special defense and the basis for their petitions for declaratory judgments (Record, pp. 44-5).

Section 24 refers exclusively and entirely to common law actions by an employee against his insured employer where there has been no previous waiver of common law rights. It does not apply in any respect to a common law action brought by an employee of an insured general contractor against a sub-contractor where there has been a definite acceptance of compensation and waiver of common law rights prior to the institution of such action, as is the situation in the case at bar. The Circuit Court of Appeals, therefore, erred prejudicially in applying the provisions of Section 24 to the case at bar and in ruling substantially that, in the absence of proof of the non-applicability of Section 24 or of compliance with its provisions the Workmen's Compensation Act of New York applied and that Bagnel might maintain a common law action there under even in the District of Massachusetts (Record, pp. 20-21).

The only provisions of the Act applicable to the case at bar are those found in Sections 15 and 18 which have been heretofore argued.

IV: The Circuit Court of Appeals Violated the General Principles of Conflict of Laws and Article IV, Section 1, of the Constitution of the United States by its Judgment.

The District Court found the facts as agreed upon that Bagnel's injury arose out of his work upon the Springfield job; that his employer, Jacobson & Sons Co., the general contractor, was insured under the Act, that Springfield Sand and Tile Company and the Construction Service Corporation were sub-contractors of Jacobson & Sons Co., and ruled that Jacobson & Sons Co.'s Massachusetts policy covered Bagnel's employment and that under the Act

Bagnel had no common law action for negligence against the appellants. This is in accord with the principles of Conflict of Laws under the decisions of the Court of Massachusetts.

Peterson vs. B. & M. RR., 310 Mass. 45, 47.
Herman vs. Sladowsky, 301 Mass. 534, 535-536.
Jackson vs. Anthony, 282 Mass. 540, 545-546.

and also in accord with such decisions under section 18 of the Act.

Carlson vs. Dowgielswicz, 304 Mass. 560, 562.
Clark vs. M. W. Leahy & Co. Inc., 300 Mass. 565, 568.

In vacating the judgments and decrees of the District Court, the Circuit Court of Appeals did violence to these principles of Conflict of Laws, as adjudicated in other cases by this Court and to Article IV, Section 1, of the Constitution of the United States.

Magnolia Petroleum Co. vs. Hunt, 64 U. S. S. C. Rep. 208.
Pacific Employers Ins. Co. vs. Industrial Accident Commission, 306 U. S. 493, 502.

V: Conclusion.

Wherefore your petitioners respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit should be issued.

Respectfully submitted,

Thomas H. Mahony,
Attorney for Petitioners.

Of Counsel:
John I. Robinson,
Joseph J. Leonard.